False Claims Act
Year in Review: 2022

DLA PIPER

Introduction

In fiscal year 2022, the Department of Justice's (DOJ) total False Claims Act (FCA) recoveries through settlements and judgments exceeded $2 billion.[1] Relative to total recoveries of more than $5.6 billion in fiscal year 2021 and more than $2.2 billion in fiscal year 2020,[2] we see a marked decrease that may reflect DOJ's evolving FCA enforcement priorities. Of those 2022 recoveries, more than $1.9 billion came from settlements and judgments in matters commenced under the *qui tam* provisions of the FCA,[3] an increase from $1.66 billion in 2021 and $1.7 billion in 2020.[4] In contrast, recoveries in non–qui tam matters in 2022 totaled approximately $300 million—a significant decrease from the $3.9 billion in non-qui tam recoveries during 2021 and $545 million in 2020.[5] These decreases in recovery may be a byproduct of the DOJ's evolving FCA enforcement priorities (which are discussed in more detail below).

[1] *See* Justice Department's False Claims Act Settlements and Judgments Exceed $2 Billion in Fiscal Year 2022, Justice News, Department of Justice (Feb. 7, 2023), *available at:* https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022.

[2] Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021, Justice News, Department of Justice (Feb. 1, 2022), *available at:* https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year; Justice Department Recovers Over $2.2 Billion from False Claims Act Cases in Fiscal Year 2020, Justice News, Department of Justice (Jan. 14, 2021), *available at:* https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020.

[3] *See* Justice Department's False Claims Act Settlements and Judgments Exceed $2 Billion in Fiscal Year 2022, Justice News, Department of Justice (Feb. 7, 2023), *available at:* https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022.

[4] *See* Fraud Statistics – Overview – Oct. 1, 1986 – Sept. 30, 2021, Department of Justice, Civil Division, *available at:* https://www.justice.gov/opa/press-release/file/1467811/download.

[5] *See* Fraud Statistics – Overview – Oct. 1, 1986 – Sept. 30, 2021, Department of Justice, Civil Division, *available at:* https://www.justice.gov/opa/press-release/file/1467811/download.

But one should also bear in mind that 2021 saw a marked increase in recoveries through settlements involving opioid litigation, including the $3 billion combined settlement with Purdue Pharma and the Sackler family.[6] Netting out the year-end numbers to account for the opioid factor, FY 2020 and 2021 FCA recoveries were substantially *lower* than the previous ten years, and 2022 total recoveries appear to be relatively in line with 2020 and 2021.[7] And industry-specific data reflect that the vast majority of FCA recoveries arose in connection with the healthcare industry at more than $1.7 billion (down from $5 billion in 2021).

This year also saw significant jurisprudential and legislative developments. Numerous circuit splits remain on key issues, including one that will be resolved by the Supreme Court by June 2023 regarding the government's authority to dismiss a *qui tam* action over a relator's objection and another that the Supreme Court will resolve next term. Several issues of first impression were decided as well, including the D.C. Circuit's groundbreaking holding that an FCA defendant is entitled to a pro tanto offset of common damages by amounts the government received in settlement from other defendants. Finally, U.S. Senator Chuck Grassley (R–IA) is again championing amendments to the FCA that could result in significant changes in FCA litigation and the potential for increased risk for *qui tam* defendants.

Some of the most significant developments for FCA defendants in 2022 came from DOJ, which announced three new enforcement initiatives that may have significant implications for businesses across many industry sectors. *First*, DOJ has announced an initiative to crack down on fraud in connection with the Paycheck Protection Program implemented in the aftermath of the COVID-19 pandemic. *Second*, DOJ has begun using the FCA as a vehicle to enforce fraud relating to the provision of cybersecurity services to the government. *Third*, DOJ has increased FCA enforcement against nursing home operators based on false certifications of compliance with federal nursing home regulations.

These developments, emerging trends, and high-profile FCA cases will be addressed in detail in this "year in review."

[6] Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021, Justice News, Department of Justice (Feb. 1, 2022), *available at:* https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year.

[7] Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021, Justice News, Department of Justice (Feb. 1, 2022), *available at:* https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year.

Jurisprudential developments

Materiality

The lower courts continued to grapple with implications of the United States Supreme Court's landmark 2016 FCA decision on materiality in ***Universal Health Services, Inc. v. U.S. ex rel. Escobar***.[8] Under the FCA, liability turns in part on whether the defendant's false statement is "material" to the government's payment decision.[9] A misrepresentation is "material" if it has a "natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[10] In *Escobar*, the Supreme Court emphasized that the materiality requirement is both "rigorous" and "demanding"; mere "minor or insubstantial" misrepresentations do not suffice.[11] The government's knowledge of the defendant's misrepresentation is a crucial aspect of the *Escobar* materiality assessment: "If the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material."[12]

This stringent *Escobar* materiality standard continues to have significant implications for FCA claims. In 2022, two courts of appeals decisions – one from the Sixth Circuit and another from the D.C. Circuit – significantly constrained the ability of FCA defendants to disprove the materiality of their misrepresentations by pointing to the government's knowledge or conduct. This, in turn, may make it easier for relators or DOJ in those jurisdictions to overcome *Escobar* and establish materiality, even in cases where the government continued making payments while fully aware of the defendant's misrepresentations.

In ***U.S. ex rel. USN4U, LLC v. Wolf Creek Federal Services, Inc.***, the Sixth Circuit explained that Escobar's caution about government knowledge was inapplicable to a *qui tam* action alleging that the defendant grossly overcharged for services that were not actually performed.[13] In *Wolf Creek*, the relator filed a *qui tam* action against a federal contractor for submitting falsely inflated estimates of facility maintenance projects to NASA.[14] The relator alleged that NASA relied on these estimates and awarded the contractor several maintenance projects at extremely inflated prices.[15] The contractor successfully moved to dismiss, arguing in relevant part that NASA's decision to continue awarding it contracts, even after becoming aware of the allegations, was dispositive to the materiality inquiry under *Escobar*.

The Sixth Circuit reversed, holding that the contractor's inflated estimates may be material even if NASA continued the relationship after becoming aware of the alleged fraud.[16] The panel held that *Escobar's* view of "actual knowledge" as strong evidence of non-materiality was inapplicable to this case for two reasons.[17] *First*, unlike allegations of regulatory non-compliance where a violation can be minor or insubstantial, allegations of grossly inflated estimates go "to the very essence of the bargain" because they could influence the decision to award the contract in the first instance and, thus, could constitute fraudulent inducement under the FCA.[18] For this reason, the contractor's drastic overstatement of costs may be material even if the government had actual knowledge of the misrepresentation of those costs. The panel suggested several reasons why a government may not want to prematurely end the relationship over alleged fraud, including a lack of other suppliers or high costs associated with implementing a last-minute bidding process. *Second*, the panel stressed that NASA must have had *actual knowledge* of inflated estimates; knowledge of mere allegations of inflated estimates was insufficient.

[8] 579 U.S. 176 (2016).
[9] *See* 31 U.S.C. § 3729(a).
[10] *Id.* § 3729(b)(4).
[11] 579 U.S. at 195 ("[A] misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision.").
[12] *Id.* at 192, 194.
[13] 34 F.4th 507 (6th Cir. 2022).
[14] *Id.* at 511–512.
[15] *Id.* at 512–13.
[16] *Id.* at 516–17.
[17] *Id.* at 517.
[18] *Id.*

The ruling is a cautionary tale to FCA defendants who believe the government's knowledge of the allegations provides blanket protection against a finding of materiality. It also provides a potentially significant tool for the government and relators to oppose a motion to dismiss on materiality. They can now argue that, if the fraud was of a nature that it threatened the intrinsic fairness of the contract, the government's actual knowledge of fraud would not be dispositive on the issue of materiality. It also puts FCA defendants in the somewhat precarious position of having to argue (and concede) that the government was aware of *actual* fraud they committed (or at least facts that would amount to fraud), not just that the government was aware of allegations of fraud, which could still be disputed on the merits.

In ***U.S. ex rel. Vermont National Telephone Co. v. Northstar Wireless, LLC***, the D.C. Circuit held that a misrepresentation in a claim for payment may be material even if the government ultimately decided not to pay the claim.[19] In that case, a relator brought a *qui tam* action alleging that defendants falsely sought small business bidding credits during their successful bid for government contracts.[20] The district court dismissed the case on the ground that the relator failed to adequately plead materiality because the government, after becoming aware of the defendants' misrepresentations, declined to award the small business bidding credits.[21]

The D.C. Circuit reversed the dismissal and joined the First, Fourth, Fifth, Sixth, and Ninth Circuits in holding that the materiality inquiry focuses on "the potential effect of the false statement when it was made rather than on the false statement's actual effect after it is discovered."[22] Because the defendants' misrepresentations were "capable of influencing" the government's bid credit eligibility determination at the time made, they were material regardless of whether or not the credits were ever ultimately awarded.

Both *Wolf Creek* and *Northstar* demonstrate that, notwithstanding *Escobar*, courts are still reluctant to allow FCA defendants to use the government's knowledge or conduct at the pleading stage to defeat FCA claims for lack of materiality.

Scienter: reckless disregard

There have also been significant developments relating to the FCA's scienter requirements, in particular, allegations about misrepresenting compliance with ambiguous statutory and regulatory provisions. Liability under the FCA attaches when a defendant "knowingly" makes a false claim.[23] The FCA defines "knowingly" to mean that a person either "i) has actual knowledge of the information; ii) acts in deliberate ignorance of the truth or falsity of the information; or iii) acts in reckless disregard of the truth or falsity of the information."[24] But the FCA does not define "reckless disregard." Courts must therefore look to decisions interpreting analogous statutes for guidance.

One such decision from 2007 is ***Safeco Insurance Co. of America v. Burr***, where the Supreme Court interpreted the scienter requirement in the Fair Credit Reporting Act, and defined recklessness as "conduct violating an objective standard."[25] *Safeco* set out a two-step test to determine whether a defendant's regulatory noncompliance was reckless: *first*, was the defendant's interpretation of the statute objectively reasonable; and *second*, was there authoritative guidance that should have warned the defendant that its interpretation was flawed.[26]

The Third, Seventh, Eighth, Ninth, and D.C. Circuits have applied *Safeco* to the FCA's "reckless disregard" scienter standard where the FCA action involves

[19] 34 F.4th 29 (D.C. Cir. 2022).
[20] *Id.* at 34.
[21] *Id.* at 34, 36.
[22] *Id.* at 37; *see U.S. ex rel. Loughren v. Unum Group*, 613 F.3d 300, 309 (1st Cir. 2010); *U.S. ex rel. Longhi v. U.S.*, 575 F.3d 458, 470 (5th Cir. 2009).
[23] 31 U.S.C. § 3279(a).
[24] *Id.* § 3279(b)(1)(A).
[25] 551 U.S. 47, 68 (2007).
[26] *Id.* at 70–71.

contested statutory and regulatory requirements.[27] In these Circuits, a defendant "knowingly" makes a false claim under the "reckless disregard" standard when the defendant applied an objectively *unreasonable* interpretation of the applicable statute or regulation or when authoritative guidance should have warned the defendant that it was not in compliance.[28] Notably, a petition for certiorari to review one of these decisions – the Seventh Circuit's decision in ***U.S. ex. rel. Schutte v. SuperValu Inc***. – was filed earlier this year with the Supreme Court, and in December 2022, the government filed a brief urging the Court to resolve the circuit split on this issue. The next month the U.S. Supreme Court granted certiorari in this case and *Proctor* (discussed below), which strongly suggests that it will provide much-needed clarity on this issue in the future.

The Supreme Court's decision to grant certiorari in the *SuperValu* and *Proctor* cases reflects the lack of uniformity among the federal courts on this issue. For instance, in ***U.S. ex rel. Sheldon v. Allergan Sales, LLC***, an equally divided Fourth Circuit expressed doubt on other courts' views on the "reckless disregard" standard. The case began when a relator brought a *qui tam* action against a drug manufacturer alleging the manufacturer overcharged Medicare by failing to grant Medicare certain statutorily required rebates.[29] Although the rebate statute was ambiguous, according to the relators there was some evidence that the manufacturer subjectively believed it was not in compliance and even took steps to hide its perceived noncompliance from the government.[30] Still, the district court dismissed the action, ruling that the manufacturer's subjective belief of non-compliance was irrelevant because: (i) an objectively reasonable interpretation of the rebate statute justified the defendant's conduct, and (ii) no authoritative guidance warned the defendant that it was not complying with the law.[31]

On appeal, a split panel upheld the dismissal and held that *Safeco's* two-step test for assessing "reckless disregard" applied to FCA actions, and that this objective standard precludes inquiry into a defendant's subjective intent."[32] Judge Wynn dissented. He objected to the application of *Safeco*, contending that a defendants' subjective belief that it was not in compliance with the statute satisfies the FCA's scienter requirement and, thus, he could be liable on the alternative basis of actual knowledge or deliberate ignorance even if the recklessness standard was not met.[33]

The Fourth Circuit granted en banc review. But the full court (with several vacancies) equally divided on the issue, which led it to vacate the panel's opinion and affirm the district court's dismissal of the case by per curiam opinion.[34] It is thus apparent that not all the appellate courts are in lockstep on the proper interpretation of the "reckless disregard" basis for scienter under the FCA. Until now, an FCA defendant alleged to have misrepresented its regulatory compliance could take refuge in an objectively reasonable interpretation – regardless of its subjective beliefs. That may no longer be the case, particularly if the Supreme Court takes on this issue or if new judicial appointments to the Fourth Circuit join the wing of the Court who decline to rely on *Safeco's* to the FCA's scienter standard.

Another 2022 decision provided additional guidance on the scope of *Safeco's* second prong – the "authoritative guidance" that should warn FCA defendants away from otherwise reasonable interpretations of statutes. In ***U.S. ex rel. Proctor v. Safeway, Inc***, a panel majority of the Seventh Circuit used a "totality of the circumstances" approach to find that a solitary footnote in a non-binding agency manual was not authoritative guidance sufficient to warn the defendant away from its preferred interpretation.[35] In reaching its conclusion, the Seventh Circuit also indicated that, in the future, it would likely find that only binding agency guidance satisfies *Safeco's* second prong, observing that "dicta suggest[s] the [Supreme] Court might impose such a requirement" and "[o]ur own case law lends support for such a distinction." [36]

[27] *U.S. ex rel. Schutte v. SuperValu Inc.*, 9 F.4th 455, 459 (7th Cir. 2021); *U.S. ex rel. Streck v. Allergan, Inc.*, 746 F. App'x 101, 106 (3d Cir. 2018); *U.S. ex rel. McGrath v. Microsemi Corp.*, 690 F. App'x 551, 552 (9th Cir. 2017); *U.S. ex rel. Donegan v. Anesthesia Assocs. of Kansas City, PC*, 833 F.3d 874, 879–80 (8th Cir. 2016); *U.S. ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 290–91 (D.C. Cir. 2015).
[28] *See, e.g., Supervalu Inc.*, 9 F.4th at 465.
[29] 24 F.4th 340, 346 (4th Cir. 2022).
[30] *Id.* at 360–61 (Wynn, J., dissenting).
[31] *Id.* at 346–47.
[32] *Id.* at 348.
[33] *Id.* at 361.
[34] *U.S. ex rel. Sheldon v. Allergan Sales, LLC*, 49 F.4th 873 (Mem) (4th Cir. 2022).
[35] 30 F.4th 649, 662–63 (7th Cir. 2022).
[36] *Id.* at 661.

Similarly, the Fourth Circuit in ***U.S. ex rel. Gugenheim v. Meridian Senior Living, LLC***, held a defendant lacked scienter when it failed to comply with ambiguous regulatory provisions. The Court reasoned that a defendant does not act with reckless disregard simply because it "could have sought more guidance about an ambiguous regulation."[37]

These decisions are especially important to businesses facing ambiguous regulations that have not been clarified through binding agency-level guidance. Courts appear inclined to continue holding that the FCA's scienter requirements are rigorous and are not satisfied when a business, lacking authoritative guidance on an ambiguous regulation, acts under an interpretation that is objectively reasonable.

The Supreme Court will soon have the opportunity to resolve these issues. In January 2023, it granted certiorari in the *SuperValu* and *Proctor* cases (discussed above) and consolidated those cases for purposes of briefing and argument.

And a separate petition also has been filed seeking Supreme Court review of the Eleventh Circuit's unpublished opinion in ***U.S. ex rel. Olhausen v. Arriva Medical, LLC*** in which the court, applying *Safeco*, affirmed the district court's dismissal because the defendant's "objectively reasonable conclusion . . . negates the scienter element."[38] In *Olhausen*, the issue presented in the writ is "[w]hether an [FCA] defendant alleged to have 'knowingly' violated a provision of federal law can escape liability by articulating, *after the fact*, an objectively reasonable interpretation of the provision under which its conduct would have been lawful." Neither petition has been ruled on at the time of publication.

Finally, practitioners also should be aware that courts have still not decided whether the FCA requires not only knowledge that a representation was false but also knowledge that a representation was material. The genesis of this question is the Supreme Court's passing statement in *Escobar* that scienter depends on the defendant "knowingly violat[ing] a requirement that the defendant knows is material to the Government's payment decision."[39] For example, earlier this year, the Ninth Circuit in ***U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.***, declined to decide whether *Escobar* requires a defendant to have knowledge of that representation's materiality.[40] At least for now, FCA defendants still may defend against FCA claims on grounds that they lacked of knowledge not only of the falsity of misrepresentations, but also of their materiality.

Kickback schemes

Relators may pursue FCA claims based on alleged violations of the Anti-Kickback Statute (AKS), on the ground that submitting a claim to the government that "includes items or services *resulting from* an [AKS] violation constitutes a false or fraudulent claim for purposes of [the FCA]."[41] By way of background, in 2018, the Third Circuit in ***U.S. ex rel. Greenfield v. Medco Health Solutions*** was the first U.S. Court of Appeals to address the question of what causal "link" was sufficient to connect an alleged kickback scheme to a subsequent claim for reimbursement: "a direct causal link, no link at all, or something in between."[42] The court there rejected strict "but for" causation, ruling that a relator need not prove "that the underlying medical care would not have been provided but for a kickback."[43]

In July 2022, the Eighth Circuit in ***U.S. ex rel. Cairns v. D.S. Medical LLC*** split from the Third Circuit and adopted a causation standard for AKS-based FCA claims that is more favorable for FCA defendants.[44] In so ruling, the Eighth Circuit made it more difficult for the government and relators to establish FCA claims based on alleged AKS violations.

In *Cairns*, the Eighth Circuit rejected the Third Circuit's approach and held instead that the statutory "resulting from" language requires a "but-for causal relationship," that is, the relator must prove a direct causal link between the AKS violation and the defendant's subsequent submission to the government of a false claim for reimbursement.[45] In other words, the FCA is not violated even if the defendant submits a claim for payment for services that were "tainted" by a kickback that violates the AKS. Instead, the FCA is violated only if the defendant claims payment for services that would not have been provided but for the unlawful kickback.

[37] 36 F.4th 173, 181 (4th Cir. 2022).
[38] App. No. 21-10366, 2022 WL 1203023, at *2 (11th Cir. Apr. 22, 2022).
[39] 579 U.S. at 181.
[40] 44 F.4th 838 (9th Cir. 2022).
[41] 42 U.S.C. § 1320a-7b(g) (emphasis added).
[42] 880 F.3d 89, 95 (3d Cir. 2018).
[43] *Id.* at 96.
[44] 42 F.4th 828 (8th Cir. 2022).
[45] *Id.* at 834.

Put differently, the government (or a relator) would have to prove "the defendants would not have included particular 'items or services' [in their claims to the government] absent the illegal kickbacks."[46] The Eighth Circuit thus diverged from the Third Circuit in *Greenfield*, where the court endorsed the "tainted" claim theory of AKS-based claims under the FCA.[47]

The implications for defendants resulting from this circuit split are significant. In the Eighth Circuit, defendants may avoid FCA liability if the item or service in question would have been provided regardless of the alleged kickbacks. This return to the plain text of the AKS allows FCA defendants to force the relator to show a causal link between the unlawful kickback and the submission of a claim for payment.

Unfortunately, the case law in other circuits remains ambiguous. For example, the First Circuit – in dicta – previously stated an FCA claim based on the AKS requires a "sufficient causal connection between an AKS violation and a claim submitted to the federal government." ***Guilfoile v. Shields***, 913 F.3d 178, 190 (1st Cir. 2019). The First Circuit did not elaborate as to whether but-for causation will suffice. For now, however, litigants in circuits other than the Third Circuit have a basis to argue the government must prove actual, but-for causation to prove an FCA claim based on violations of the AKS.

Whistleblower retaliation & harassment

Under the FCA, an employee is entitled to relief if the employee "is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts" undertaken to stop an FCA violation.[48] In August 2022, the Seventh Circuit joined the Second, Fourth, Ninth, and D.C. Circuits when holding in ***U.S. ex rel. Sibley v. University of Chicago Medical Center*** that the heightened pleading standard in Federal Rule of Civil Procedure 9(b) does not apply to FCA retaliation claims.[49] The court described this conclusion as "logical" because, unlike a typical FCA claim, an FCA retaliation claim does not involve allegations of fraud.[50]

But even if an employee need not plead retaliation with particularity, the employee must, according to the Seventh Circuit, do more than merely allege a "generic description of hostility." In ***Lam v. Springs Window Fashions, LLC***, an employee sued management for retaliation under the FCA after she notified management about the company's potential violations of tariff laws (protected conduct for FCA-retaliation purposes).[51] The employee argued that management retaliated against her, in part, by berating and scolding her in response to her stance that the company was non-compliant with tariff laws.[52] The Seventh Circuit affirmed the grant of summary judgment on her retaliation claim because this allegation did not rise to the level of harassment necessary to sustain an FCA retaliation claim.[53]

The Seventh Circuit noted that only the Fifth and Ninth Circuits had addressed the meaning of the term "harassed" under § 3730(h)(1) of the FCA.[54] On the one hand, the Fifth and Ninth Circuit applied the relatively lenient test used to assess employment-retaliation claims under Title VII, which requires only a showing that conduct would have "dissuaded a reasonable worker from complaining to management."[55] But on the other, the Seventh Circuit recognized that, in FCA retaliation actions, perhaps the more stringent test used for substantive discrimination claims under Title VII should apply, which requires a showing that the conduct was "severe or pervasive enough to affect the terms and conditions of employment."[56] In the end, the Seventh Circuit held that under either test, "generic descriptions of hostility are insufficient."[57]

This ruling highlights the thin line separating retaliatory and non-retaliatory conduct. Publicly berating an employee and scolding her for pointing out company violations was, according to the Seventh Circuit, not actionable harassment under the FCA.[58] Yet, in ***U.S. ex rel. Bias v. Tangipahoa Parish School Board***, the Fifth Circuit had found examples of "shout[ing]" and "badgering," and spreading rumors about the employee to constitute harassment under the FCA.[59]

[46] *Id.*
[47] 880 F.3d 89, 97 (3d Cir. 2018).
[48] 31 U.S.C. § 3730(h).
[49] 44 F.4th 646, 661 (7th Cir. 2022); *see also U.S. ex rel. Chorches v. Am. Med. Response, Inc.*, 865 F. 3d 71, 95 (2d Cir. 2017) (collecting cases).
[50] *Id.* at 661-62.
[51] 7 F.4th 431, 435–36 (7th Cir. 2022).
[52] *Id.* at 436.
[53] *Id.* at 437–38.
[54] *Id.* (citing *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab'y*, 275 F.3d 838, 847-48 (9th Cir. 2002); *U.S. ex rel. Bias v. Tangipahoa Par. Sch. Bd.*, 816 F.3d 315, 326 (5th Cir. 2016)).
[55] *Id.*
[56] *Id.* at 437.
[57] *Id*. at 438.
[58] *Id.*
[59] 816 F.3d 315, 326 (5th Cir. 2016).

Statute of limitations / statute of repose

Liability under the FCA is subject to a ten-year statute of repose. 31 U.S.C. § 3731(b)(2).[60] In ***U.S. ex rel. Tracy v. Emigration Improvement District***, the Tenth Circuit explained that this ten-year statute of repose begins to run from "the act of making a false claim, not from the government's payment of the claim."[61] The Court noted that a statute of repose runs from "when the defendant attempted to cause the government pay out money."[62] For this reason, practitioners should be aware that an action is untimely if it is brought more than ten years after an FCA defendant submitted a claim for payment.

In another ruling favorable to FCA defendants, the Sixth Circuit in ***El-Khalil v. Oakwood Healthcare, Inc.***, held that the statute of limitations begins to run for an FCA retaliation claim on "the date when the retaliation occurred," not on the date the plaintiff discovered facts giving rise to the claim.[63] Affirming the district court's finding that the employee's claim was time-barred, the Sixth Circuit explained, "[the] text is unequivocal: [t] he limitations period commences when the retaliation actually happened."[64]

[60] The FCA's 10-year statute of repose requires any FCA claim to be filed within 10 years of the date of the alleged fraud, regardless of when the fraud was or should have been discovered. 31 U.S.C. § 3731(b)(2). That is not to be confused with the statute of limitations, which requires an action to be filed within six years or "three years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances." 31 U.S.C. § 3731(b)(1)

[61] 2022 WL 16570934, at *3 (10th Cir. 2022).

[62] *Id.*

[63] 23 F.4th 633, 635 (6th Cir. 2022).

[64] *Id.*

Supreme court to resolve DOJ's authority to dismiss *qui tam* actions

The FCA vests the Attorney General with discretionary authority to dismiss a *qui tam* action over a relator's objection.[65] Until 2018, DOJ seldom exercised this authority. Toward the end of 2017, Michael Granston, then-Director of DOJ's Civil Fraud Section, indicated that DOJ would make more frequent use of its authority to seek dismissal of meritless *qui tam* actions. In early 2018, Granston followed through on this monumental shift in policy by issuing an internal agency memorandum (the Granston Memo)[66] identifying the circumstances under which DOJ civil prosecutors should consider dismissing FCA claims under Section 3730(c)(2)(A). This shift in policy has spawned considerable litigation over the last four years concerning the circumstances in which the DOJ can seek dismissal of a relator's FCA action.

On June 21, 2022, the U.S. Supreme Court granted certiorari to hear an appeal from the Third Circuit's decision in ***U.S. ex rel. Polansky v. Executive Health Resources, Inc.***[67] – a case that will resolve a circuit split on the applicable standard when the government intervenes to dismiss an FCA suit over the relator's objection.

The FCA provides that the government "may dismiss the action notwithstanding the objections" of the relator so long as the relator is given the opportunity to be heard on the motion,[68] but it is silent on how courts should evaluate the government's authority to seek dismissal of an FCA complaint. Federal appellate courts have adopted three different standards: (1) the "unfettered discretion" standard[69]; (2) the "rational relation" standard[70]; and (3) the Rule 41(a) standard.[71] By June 2023, the Supreme Court is expected to decide the applicable standard.

The "unfettered discretion" standard is most deferential to the government. In the First and D.C. Circuits, the government is afforded an "unfettered right" to terminate a *qui tam* complaint, constrained only by constitutional limitations.[72] The Fifth Circuit, while not fully embracing the "unfettered discretion" standard, joined the First and D.C. Circuit's view of broad government authority to dismiss FCA complaints.[73] This is the more favorable standard for FCA defendants.

By contrast, the "rational relation" standard is least deferential to the government. The Ninth and Tenth Circuits have taken a narrower view of the government's authority. To move to dismiss a *qui tam* complaint, the government must identify a "valid government purpose" and a "rational relation between dismissal and accomplishment of that purpose."[74] If the government establishes as much, then the burden shifts to the relator to show that dismissal would be "fraudulent, arbitrary and capricious, or illegal."[75] This is a less favorable standard for FCA defendant – but still a difficult one for relators to overcome if employed by DOJ.

The Rule 41(a) standard carves out a middle approach. The Third and Seventh Circuits have held that the government's motion to dismiss a *qui tam* complaint should be assessed under the same standard as Federal Rule of Civil Procedure 41(a), the rule governing voluntary dismissal after a defendant files a responsive pleading.[76] In applying this standard, courts are vested with a broad grant of discretion to dismiss on terms that the court considers "proper."

[65] 31 U.S.C. § 3730(c)(2)(A).
[66] Factors for Evaluating Dismissal Pursuant to 31 U.S.C. § 3730(c)(2)(A), Department of Justice, Civil Division, Commercial Litigation Branch, Fraud Section (Jan. 10, 2018), *available at:* https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf.
[67] 17 F.4th 376 (3d Cir. 2021).
[68] 31 U.S.C. § 3730(c)(2)(A).
[69] *See, e.g., Borzilleri v. Bayer Healthcare Pharm.*, 24 F.4th 32, 44 (1st Cir. 2022); *Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008).
[70] *See, e.g., U.S. ex rel., Sequoia Orange Co. v. Baird-Neece Packing Co.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (applying rational relation standard).
[71] *See Polansky*, 17 F.4th at 392.
[72] *Borzilleri v. Bayer Healthcare Pharm.*, 24 F.4th 32, 44 (1st Cir. 2022); *Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008).
[73] *U.S. ex rel. Health All. LLC v. Eli Lilly & Co.*, 4 F.4th 255, 267 (5th Cir. 2021).
[74] *Ridenour v. Kaiser-Hill Co., L.L.C.*, 397 F.3d 925, 937 (10th Cir. 2005); *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Co.*, 151 F.3d 1139, 1145 (9th Cir. 1998).
[75] *Sequoia Orange*, 151 F.3d at 1145.
[76] *Polansky*, 17 F.4th at 392; *U.S. ex rel. CIMZNHCA, LLC, v. UCB, Inc.*, 970 F.3d 835, 849 (7th Cir. 2020).

The standard the U.S. Supreme Court adopts may shape the defense strategy in all future FCA cases. If the government is afforded wide latitude in dismissing *qui tam* complaints it considers to be problematic (for whatever reason),[77] it means a qui tam defendant need only persuade the *government* that dismissal is warranted. The "unfettered discretion" standard is the most direct route to that end. It gives a *qui tam* defendant latitude to pursue with the government a dismissal of the case based on the concerns that animated the Granston Memorandum, including the high cost of discovery and monitoring, potential adverse effects on FCA enforcement, or possible interference with government policy.

On the other hand, the "rational relation" standard raises the bar on the types of cases the government may successfully challenge to dismiss. The more active role for the court contemplated by the rational relation standard means that DOJ will be less likely to intervene for purposes of seeking dismissal and less likely to be successful when they do so. In that way, greater court involvement would create an additional hurdle for a *qui tam* defendant and the government, as well as less certainty about the outcome of a government motion to dismiss.

The Rule 41(a) standard provides possibly the greatest near-term uncertainty because district courts will be left to determine what circumstances are "proper" to justify voluntary dismissal by the government on a case-by-case basis. Some judges are more deferential to the government while others are less so. Depending on the judicial draw, the Rule 41(a) standard can swing from resembling the more favorable "unfettered discretion" standard to the less favorable "rational relation" standard. If the Supreme Court adopts this standard, it will be crucial for practitioners to focus on developing favorable case law that will guide future courts in their assessment of what constitutes "proper" circumstances.

The Supreme Court held oral argument in *Polansky* in December 2022. During argument, numerous justices expressed separation-of-powers concerns about the proposal that they adopt a standard that would curb or limit DOJ's dismissal authority. It appears that a majority of the Court favor adopting a highly deferential standard of review akin to the unfettered discretion standard endorsed by certain courts. Regardless, the Supreme Court's decision, slated for this term, will not only clarify the government's dismissal authority, but drive defense strategies in creating potential early off-ramps to FCA cases. Put simply, persuading the government to intervene and move to dismiss a relator's complaint terminates the action at its inception, saving FCA defendants from the burden and cost of litigating often meritless claims.

[77] Examples from the Granston Memo include (i) curbing meritless *qui tam* actions, (ii) preventing parasitic or opportunistic *qui tam* actions; (iii) preventing interference with agency policies and programs; (iv) controlling litigation brought on behalf of the United States; (v) safeguarding classified information and national security interests; and (vi) preserving government resources, such as where the government's expected costs are likely to exceed any expected gain.

DOJ enforcement initiatives

DOJ's 2022 FCA enforcement highlighted initiatives combating three types of fraud: (i) Paycheck Protection Program fraud, (ii) cybersecurity fraud, and (iii) nursing home fraud. DOJ cast a wide net with these initiatives with major implications for businesses.

Cracking down on PPP fraud

The 2020 Coronavirus Aid, Relief, and Economic Security (CARES) Act provided over $2.2 trillion in economic relief during the COVID-19 pandemic.[78] Approximately $800 billion of that total came from the Paycheck Protection Program (PPP).[79] Under PPP, the Small Business Administration (SBA) authorized short-term loans for businesses to meet payroll and other expenses during the pandemic. SBA forgave the loans if their recipients maintained employee and compensation levels and spent enough of the loan proceeds on qualifying expenses. The SBA also authorized private banks to issue PPP loans and paid the banks between 1 percent and 5 percent of the loan total. All told, the SBA authorized 11.4 million PPP loans.[80]

Approximately 10 percent of those 11.4 million loans are believed to be fraudulent, which has prompted DOJ to pursue FCA claims to combat PPP fraud. Researchers at the University of Texas estimated 1.4 million PPP loans "show signs of possible fraud," based on "metrics related to potential misreporting including non-registered businesses, multiple businesses at residential addresses, abnormally high implied compensation per employee, and large inconsistencies with jobs reported in another government program."[81] The SBA Inspector General identified over 70,000 potentially fraudulent PPP loans.[82] In response, Attorney General Merrick Garland promised to "work relentlessly to combat pandemic fraud and hold accountable those who perpetrate it."[83] In March 2022, DOJ appointed Associate Deputy Attorney General Kevin Chambers to become its "Director for COVID-19 Fraud Enforcement."[84] Chambers established COVID-19 "Strike Force" teams in the Southern District of Florida, the District of Maryland, and the Central and Eastern Districts of California.[85]

DOJ's heightened enforcement against PPP fraud began to yield results in 2022. DOJ announced at least six settlements of FCA cases against recipients of PPP loans:

- A Florida pharmaceutical company, its founder, and its former chief medical officer paid $24.5 million to settle allegations that, among other things, they obtained a $5.9 million PPP loan by falsely representing they were not "engaged in unlawful activity" despite billing federal healthcare programs for unnecessary medical services and paying unlawful renumeration to the company's physicians. The PPP loan fraud was only a part of the overall FCA violation at issue, which is likely the reason the overall settlement vastly exceeded the amount of the loan. Other allegations included billing federal healthcare programs for unnecessary medical testing and services and paying unlawful remuneration to its physician employees.[86]

[78] *See* Department of Justice, *Justice Department Announces Director for COVID-19 Fraud Enforcement*, https://www.justice.gov/opa/pr/justice-department-announces-director-covid-19-fraud-enforcement (Mar. 10, 2022).
[79] Sacha Pfeiffer, *Virtually all PPP loans have been forgiven with limited scrutiny*, NPR (Oct. 12, 2022 4:48 PM), https://www.npr.org/2022/10/12/1128207464/ppp-loans-loan-forgiveness-small-business.
[80] *Id.*
[81] Griffin, John M. and Kruger, Samuel and Mahajan, Prateek, *Did FinTech Lenders Facilitate PPP Fraud?* (August 15, 2022). Journal of Finance, Forthcoming, *available at:* https://ssrn.com/abstract=3906395.

[82] SBA Inspector General Inspection Report, *SBA's Handling of Potentially Fraudulent Paycheck Protection Program Loans*, https://www.oversight.gov/sites/default/files/oig-reports/SBA/SBA-OIG-Report-22-13.pdf (May 26, 2022).
83 Department of Justice, Justice Department Announces COVID-19 Fraud Strike Force Teams, https://www.justice.gov/opa/pr/justice-department-announces-covid-19-fraud-strike-force-teams (Sep. 14, 2022).
[84] Department of Justice, *Justice Department Announces Director for COVID-19 Fraud Enforcement*, https://www.justice.gov/opa/pr/justice-department-announces-director-covid-19-fraud-enforcement (Mar. 10, 2022).
[85] Department of Justice, Justice Department Announces COVID-19 Fraud Strike Force Teams, https://www.justice.gov/opa/pr/justice-department-announces-covid-19-fraud-strike-force-teams (Sept. 14, 2022).
[86] Department of Justice, Physician Partners of America to Pay $24.5 Million to Settle Allegations of Unnecessary Testing, Improper Remuneration to Physicians and a False Statement in Connection with COVID-19 Relief Funds, https://www.justice.gov/usao-mdfl/pr/physician-partners-america-pay-245-million-settle-allegations-unnecessary-testing (Apr. 12, 2022).

- A New Jersey construction company and its owner paid $53,325 in damages and returned a $255,507 PPP loan after falsely certifying that no owner of the company was subject to criminal charges.[87]
- A New Jersey pawn shop company and its owner paid $50,000 in civil penalties and returned a $240,000 loan to settle claims they fraudulently obtained more than one PPP loan.[88]
- A Virginia company paid $31,000 in damages and returned a loan of $192,000 to settle allegations it fraudulently obtained more than one PPP loan.[89]
- A Washington energy company and its owners and executives paid about $3.25 million to settle allegations they falsely claimed they used PPP funds for payroll and other eligible expenses.[90]
- In DOJ's first intervention in a PPP-related *qui tam* case, a Florida LLC and its owner paid $21,583.31 in damages and returned a $208,332 loan to settle claims they falsely certified the business would receive only one PPP loan when it had actually received two.[91]

In addition to loan recipients, DOJ also targeted at least one private lender. A Texas bank paid $18,673.50 to settle claims it processed a PPP loan for a borrower whom the bank knew faced criminal charges and was ineligible to receive the loan.[92] This settlement, announced in September 2022, while a modest amount is significant for what it represents. It marked the first such settlement between DOJ and a PPP lender. Moving forward, PPP lenders may face increased DOJ scrutiny – particularly if they knew their borrowers were ineligible to receive loans, the lenders may have violated the FCA by providing such loans anyway.

DOJ's PPP-related enforcement is only going to increase moving forward. In August, President Biden signed legislation extending the statute of limitations for cases alleging PPP-related fraud to ten years.[93]

DOJ's PPP-related enforcement sweeps broadly, creating significant implications for businesses. PPP loan borrowers were required to make broad certifications to the SBA, including a certification that borrowers were not "engaged in any activity this is illegal under Federal, State, or local law."[94] As a result, any FCA defendant who received a PPP loan faces greater exposure merely because of the PPP loan. For example, DOJ alleged Physician Partners of America LLC was violating the Stark Law when it applied for a $5.9 million PPP loan, thereby falsifying its PPP certification "that it was not engaged in unlawful activity."[95]

As a result of DOJ's robust PPP-related enforcement, businesses that received or lent PPP loans should consider taking steps to prepare for potential enforcement actions. At a minimum, a PPP loan recipient should review the PPP application to ensure it contains no misstatements. If any potential misstatements are identified, a business should consider a more in-depth

[87] Department of Justice, *Atlantic County Company and its Owner Admit Taking Improper Paycheck Protection Program Loan*, https://www.justice.gov/usao-nj/pr/atlantic-county-company-and-its-owner-admit-taking-improper-paycheck-protection-program (Feb. 7, 2022).
[88] Department of Justice, *New Jersey Pawn Shop and its Owner Settle False Claims Act Allegations Relating to Paycheck Protection Program Loan*, https://www.justice.gov/opa/pr/new-jersey-pawn-shop-and-its-owner-settle-false-claims-act-allegations-relating-paycheck (Apr. 21, 2022).
[89] Department of Justice, *Northern Virginia Company Settles False Claims Act Allegations of Improper Paycheck Protection Program Loan*, https://www.justice.gov/opa/pr/northern-virginia-company-settles-false-claims-act-allegations-improper-paycheck-protection (Feb. 11, 2022).
[90] United States Attorney's Office, HPM Corporation and Owners Accept Responsibility, Agree to Pay Nearly $3 Million in Restitution and Penalties for Fraudulent Covid-19 Relief Loan, https://www.justice.gov/usao-edwa/pr/hpm-corporation-and-owners-accept-responsibility-agree-pay-nearly-3-million-restituti-0 (Mar. 25, 2022).
[91] Department of Justice, First-Ever Paycheck Protection Program False Claims Act Whistleblower Case in Which the United States Intervened Against the Borrower Settles, https://www.justice.gov/usao-sdfl/pr/first-ever-paycheck-protection-program-false-claims-act-whistleblower-case-which-united (Sept. 22, 2022).
[92] Department of Justice, *First-ever False Claims Act Settlement Received from Paycheck Protection Program Lender*, https://www.justice.gov/usao-sdtx/pr/first-ever-false-claims-act-settlement-received-paycheck-protection-program-lender (Sept. 13, 2022).
[93] *See* PPP and Bank Fraud Enforcement Harmonization Act of 2022, Pub. L. No. 117-166, 136 Stat. 1365. President Biden signed similar legislation extending the statute of limitations for fraud related to Economic Injury Disaster Loans for COVID-19 relief. *See* COVID-19 EIDL Fraud Statute of Limitations Act of 2022, Pub. L. No. 117-165, 136 Stat 1363.
[94] 13 C.F.R. § 120.110(h).
[95] Department of Justice, Physician Partners of America to Pay $24.5 Million to Settle Allegations of Unnecessary Testing, Improper Remuneration to Physicians and a False Statement in Connection with COVID-19 Relief Funds, https://www.justice.gov/usao-mdfl/pr/physician-partners-america-pay-245-million-settle-allegations-unnecessary-testing (Apr. 12, 2022).

examination to identify the scope of and potential liabilities arising from any potential misstatements, and whether a voluntary disclosure to the government (informally or formally under the FCA) is appropriate. A PPP loan recipient should also retain all documents related to the PPP application and loan for at least ten years from their application date. Use of the PPP loan proceeds should be carefully documented to ensure the business retains eligibility for loan forgiveness and to mitigate the risk of a potential enforcement.

Cyber-Fraud Initiative

Through its Cyber-Fraud Initiative, announced in October 2021, DOJ has begun enforcing the FCA against "new and emerging cyber threats to the security of sensitive information and critical systems."[96] The Initiative focuses on "entities or individuals that put U.S. information or systems at risk by knowingly providing deficient cybersecurity products or services, knowingly misrepresenting their cybersecurity practices or protocols, or knowingly violating obligations to monitor and report cybersecurity incidents and breaches."[97]

DOJ's Cyber-Fraud Initiative led to several FCA enforcement actions in 2022. DOJ announced its first settlement under the Initiative in March, when a Florida healthcare company agreed to pay $930,000 to settle claims it charged the government for secure data retention electronics that the company did not consistently use.[98] In July 2022, DOJ announced another settlement, when a California engineering contractor paid $9 million to settle a *qui tam* case (without intervention from the United States) in which the plaintiff alleged the contractor failed to comply with Defense Federal Acquisition Regulations and NASA regulations regarding storage of confidential government information.[99]

The Cyber-Fraud Initiative will continue to generate DOJ enforcement actions moving forward. Like the DOJ's PPP-related enforcement, the Cyber-Fraud Initiative has broad reach. Government contractors often must certify their compliance with various cybersecurity regulations – certifications that, if false, may subject those contractors to FCA liability. According to DOJ's characterization of the Initiative, merely providing "deficient" cybersecurity services to the government could trigger an enforcement action by DOJ. In light of these initiatives, businesses contracting with the government should take extra steps ensure their compliance with all applicable cybersecurity regulations. This may include an audit of cybersecurity measures and review of relevant agency regulations. If a business experiences a data breach or ransomware event, one additional consideration after the immediate danger has passed should be considering whether the business has complied with state and federal cybersecurity regulations.

National Nursing Home Initiative

DOJ announced a National Nursing Home Initiative in March 2020. This Initiative aims to "coordinate and enhance civil and criminal efforts to pursue nursing homes that provide grossly substandard care to their residents."[100] The National Nursing Home Initiative generated few – if any – enforcement actions in the two years following its announcement. In 2022, however, DOJ began enforcing the Initiative more aggressively after the Biden Administration announced a commitment to improving safety and health in nursing homes.[101]

In June 2022, DOJ filed its first publicly available FCA suit under the Initiative. The DOJ sued American Health Foundation (AHF) – a nursing home operator – for "provid[ing] grossly substandard services that failed to

[96] Department of Justice, *Deputy Attorney General Lisa O. Monaco Announces New Civil Cyber-Fraud Initiative*, https://www.justice.gov/opa/pr/deputy-attorney-general-lisa-o-monaco-announces-new-civil-cyber-fraud-initiative (Oct. 6, 2021).
[97] *Id.*
[98] Department of Justice, Contractor Pays $930,000 to Settle False Claims Act Allegations Relating to Medical Services Contracts at State Department and Air Force Facilities in Iraq and Afghanistan, https://www.justice.gov/usao-edny/pr/contractor-pays-930000-settle-false-claims-act-allegations-relating-medical-services (Mar. 8, 2022).
[99] Department of Justice, Aerojet Rocketdyne Agrees to Pay $9 Million to Resolve False Claims Act Allegations of Cybersecurity Violations in Federal Government Contracts, https://www.justice.gov/opa/pr/aerojet-rocketdyne-agrees-pay-9-million-resolve-false-claims-act-allegations-cybersecurity (July 8, 2022); *see also U.S. ex rel. Markus v. Aerojet Rocketdyne Holdings, Inc.*, No. 15-2245, 2022 WL 297093, at *1–2 (E.D. Cal. Feb. 1, 2022).

[100] Department of Justice, *Department of Justice Launches a National Nursing Home Initiative*, https://www.justice.gov/opa/pr/department-justice-launches-national-nursing-home-initiative (Mar. 3, 2020).
[101] The White House, *FACT SHEET: Protecting Seniors by Improving Safety and Quality of Care in the Nation's Nursing Homes*, https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-protecting-seniors-and-people-with-disabilities-by-improving-safety-and-quality-of-care-in-the-nations-nursing-homes/ (Feb. 28, 2022).

meet required standards of care" in three Pennsylvania and Ohio nursing homes.[102] DOJ alleged that AHF housed its residents in substandard facilities and that AHF employees gave residents unnecessary medications and subjected those residents to abuse.[103] Based on those allegations, DOJ asserted that AHF had violated the FCA because it certified compliance with federal nursing home regulations to obtain Medicare and Medicaid reimbursements.[104] Specifically, DOJ alleged AHF repeatedly made false certifications in claiming reimbursements for services "that were non-existent, grossly substandard, or in violation of" federal nursing home regulations.[105]

The complaint against AHF gives DOJ and relators a blueprint for future similar actions against nursing homes and providers. Because nursing homes frequently receive Medicare and Medicaid reimbursements, they must certify their compliance with broad federal nursing home regulations.[106] For instance, a federal regulatory requirement – cited by DOJ against AHF – obligates a nursing home to "care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident."[107] These broad regulations create the possibility for significant FCA liability for nursing homes.

The National Nursing Home Initiative may generate substantial enforcement in the coming years, as the Biden Administration has acknowledged that the pandemic highlighted the "tragic impact of substandard conditions at nursing homes."[108] Businesses operating nursing homes should take extra steps to ensure their compliance with NHRA regulations considering DOJ's heightened scrutiny.

[102] Department of Justice, *Justice Department Sues American Health Foundation and Its Affiliates for Providing Grossly Substandard Nursing Home Services*, https://www.justice.gov/opa/pr/justice-department-sues-american-health-foundation-and-its-affiliates-providing-grossly (June 15, 2022).
[103] Am. Compl. ¶¶ 4-6, *U.S. v. Am. Health Found., Inc.*, No. 2:22-cv-2344 (E.D. Pa.).
[104] *Id.* ¶¶ 30-33.
[105] *Id.* ¶ 586.
[106] 42 C.F.R. §§ 483.1-483.95.
[107] 42 U.S.C. § 1395i-3(b)(1)(A).
[108] The White House, *FACT SHEET: Protecting Seniors by Improving Safety and Quality of Care in the Nation's Nursing Homes*, https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-protecting-seniors-and-people-with-disabilities-by-improving-safety-and-quality-of-care-in-the-nations-nursing-homes/ (Feb. 28, 2022).

Emerging developments: settlement offsets in multi-defendant *qui tam* actions

On August 30, 2022, the D.C. Circuit issued the first federal appellate opinion on the appropriate method to apply when offsetting settlement credits in FCA cases involving multiple defendants.[109] In ***U.S. v. Honeywell Int'l Inc.***, the D.C. Circuit held that an FCA defendant is entitled to offset common damages dollar-for-dollar by amounts the government received in settlement from other defendants.[110] This ruling has significant implications for FCA defendants in multi-defendant cases, especially when considering whether, when, and in what circumstances to resolve an FCA claim with a monetary settlement.

Honeywell concerned claims of fraudulent misrepresentation about the performance of bulletproof vests sold to or paid for by the federal government.[111] The government commenced an FCA action against Honeywell and other entities in the supply chain, seeking to treble damages in the amount of $35 million from Honeywell. While the suit was pending, the government secured settlements totaling $36 million from other entities involved in manufacturing and supplying the vests.

Following the settlements, Honeywell moved for summary judgment on the issue of damages, claiming that it was entitled to a pro tanto (dollar-for-dollar) credit in the amount that the government secured from the settlements. Applying the pro tanto approach would mean that, even if the allegations against Honeywell were true, Honeywell could not be liable for any damages because the settlements exceeded the amounts the government alleged as damages. On the other hand, the government advocated for the proportionate share approach, in which Honeywell would be liable for its portion of fault regardless of the settlement amounts. The district court adopted the government's approach.

The D.C. Circuit reversed. Recognizing that the question of what settlement offset rule to apply is not answered by the text of the FCA, the history of the FCA, or existing case law, the D.C. Circuit found it appropriate to fashion a new federal common law rule to resolve the matter.[112] In adopting the *pro tanto* approach to govern settlement offsets under the FCA as advocated by Honeywell, and rejecting the government's proportionate share approach, the D.C. Circuit relied on the three "paramount" factors set forth by the U.S. Supreme Court in addressing the proper settlement credit rule for admiralty suits: "(1) consistency with relevant precedent; (2) promotion of settlement; and (3) judicial economy."[113]

First, the D.C. Circuit held that the consistency factor "decisively" favors the *pro tanto* approach. The D.C. Circuit explained that the *pro tanto* rule is a "better fit" with the FCA because it "has been consistently interpreted to impose joint and several liability without a right to contribution."[114] Under joint and several liability without a right to contribution, any person who violates the FCA in a joint scheme may have to pay for all of the government's treble damages and cannot force other violators to pay their fair share. Thus, when administering such liability, "the court does not determine the equitable assignment of damages."[115]

Conversely, adopting the proportionate share rule advocate by the government would be "anomalous for the FCA" for at least two reasons: (1) in cases involving partial settlements, "courts would have to decide relative culpability and assign damages based on fault[,]" which is otherwise avoided because courts applying joint and several liability without a right to contribution also generally employ the *pro tanto* approach, and (2) the government would be able to recover more than its total damages merely because some parties settled.[116]

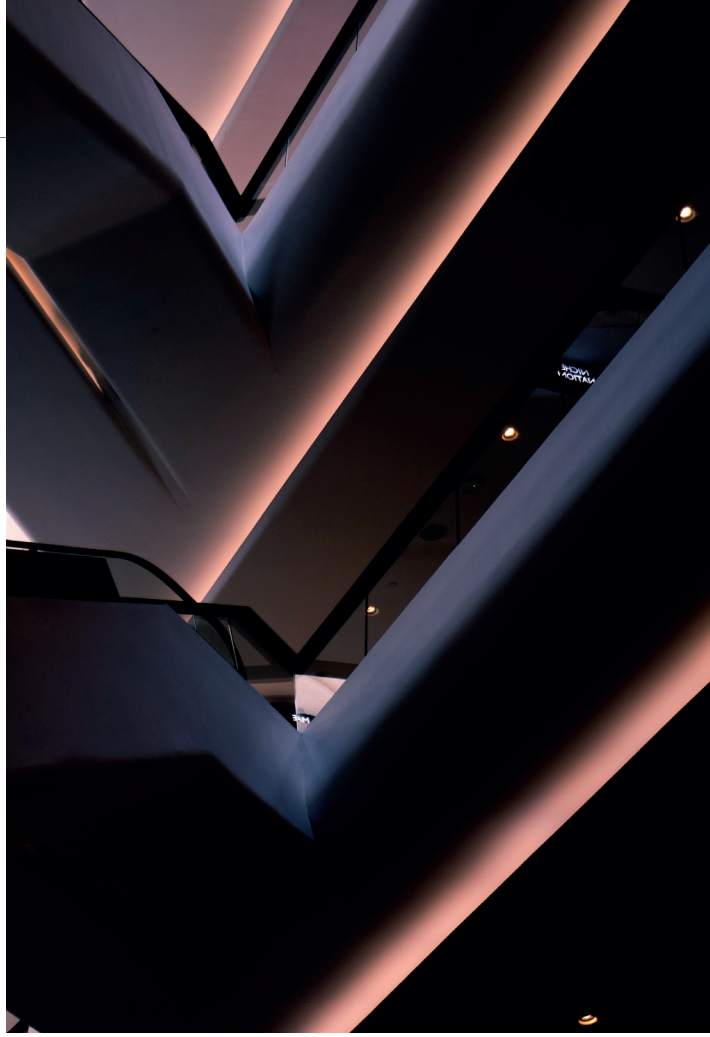
[109] 47 F.4th 805 (D.C. Cir. 2022).
[110] *Id.* at 815.
[111] *Id.* at 810-11.
[112] *Id.* at 815.
[113] *Id.* at 817 (quoting McDermott Inc., v. AmClyde, 511 U.S. 202, 211 (1994)).
[114] *Id.*
[115] *Id.*
[116] *Id.* at 817-18.

The D.C. Circuit further rejected the government's argument that the proportionate share rule is more in line with the FCA's "punitive goals."[117] While the D.C. Circuit recognized that a non-settling party, like Honeywell, may escape damages liability under the *pro tanto* approach, it explained that "the *pro tanto* rule leaves the government in the driver's seat to pursue and punish false claims according to its priorities" and the government thus "can pursue settlement and/or seek damages against each violator in line with its assessment of relative fault."[118]

Second, the D.C. Circuit held that the promotion of settlement factor was "too inconclusive to provide guidance" on the approach to employ because settlement "often turns on a complex intersection of factors that are not readily ascertained nor easily balanced by courts."[119]

Third, the D.C. Circuit held that the "judicial economy" factor "clearly favors the *pro tanto*" rule because, unlike the proportionate share approach, it "does not require an adjudication of comparative fault for its implementation."[120] The D.C. Circuit further explained that because courts apply joint and several liability to FCA claims, "the calculation of proportionate fault would introduce a new element into FCA litigation" and "would often require summoning already settled third parties back into the litigation for complex determinations of relative fault."[121]

The underlying rationale of the *Honeywell* decision seeks to ensure that the government does not recover more than the amount of its damages, with treble damages serving as the ceiling for such recovery.



To be sure, the pro tanto rule benefits a non-settling defendant where the government secures settlements in excess of treble damages. But as the D.C. Circuit recognized, in instances where the settling defendants settle for less than their relative share of liability, the pro tanto rule will mean that the non-settling defendant could be required to pay more than its proportionate share of damages.[122] At bottom, the ruling requires that the government and the defendants must be strategic in pursuing FCA settlements. Defendants must closely monitor the other settlements in a case (which are public because they must be approved by the court). Defendants should also think carefully about how to structure their joint defense agreements and, more generally, their relative liability and relationship with the other defendants. It is yet to be determined whether other circuits will follow the pro tanto approach adopted by the D.C. Circuit. Moving forward, FCA defendants should consider this ruling when assessing settlement.

[117] *Id.* at 818.
[118] *Id.*
[119] *Id.*
[120] *Id.* at 819.
[121] *Id.*

[122] *Id.* at 818 n.8.

Legislative developments

Proposed federal legislation

In July 2021, a bipartisan group of senators, led by Senator Chuck Grassley (R-IA), introduced the False Claims Amendments Act of 2021 (S2428) in the Senate. The bill's proposals would make significant changes to the FCA that, if enacted, may obviate some of the jurisprudential developments discussed above, and will impact strategies for defending FCA cases.

The Act includes the following amendments to the FCA, which are not retroactive:

1. **Materiality.** Paragraph (e) is added to the end of § 3729 of the FCA. Titled "Proving Materiality," the new paragraph specifies that the government's decision to forego a refund or pay a claim while knowing of fraud or falsity is not dispositive when determining materiality if the government had other reasons for its payment decision.
2. **Government dismissal authority.** New language is added to § 3730(c)(2)(A) of the FCA regarding the hearing for a relator facing a motion to dismiss the action by the DOJ, specifying that at the hearing, "the Government shall identify a valid government purpose and a rational relation between dismissal and accomplishment of the purpose," and the relator "shall have the burden of demonstrating that the dismissal is fraudulent, arbitrary and capricious, or illegal." (See page 10 above for a discussion of the *Polansky* case, in which the Supreme Court may adopt this or a similar standard independent of any legislation.)
3. **Retaliation.** The words "current or former" are added to § 3730(h)(1) to extend the FCA's anti-retaliation provision to acts taken against "[a]ny current or former employee, contractor, or agent[.]"
4. **FCA effectiveness.** The Act requires the U.S. Government Accountability Office's Comptroller General to submit a report to Congress no later than 18 months after the date of the enactment of the Act regarding the "effectiveness" of the FCA from the date of the enactment of the False Claims Amendments Act of 1986 to the date of the enactment of the present Act. The report must include "a description of the benefits and challenges of enforcement efforts" and "information on the amounts recovered by the Government" under the FCA during that period.

One of the main goals of the False Claims Amendments Act is to clarify the FCA's materiality requirement. The Supreme Court's landmark 2016 *Escobar* decision altered the landscape for proving materiality under the FCA. Among other things, the Court stated: "If the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material."

According to Senator Grassley's office, the *Escobar* decision "has made it all too easy for fraudsters to argue that their obvious fraud was not material simply because the government continued payment."[123] The proposed materiality amendment to the FCA is not inconsistent with the materiality standard announced in *Escobar*, but it does clarify that a false statement of regulatory compliance can be material even if the government continues to make payment with actual knowledge of falsity or fraud.

In its report on the Act, the U.S. Congressional Budget Office (CBO) estimates that the amendments to the FCA would result in an increase of approximately $145 million in the government's collection of FCA damages and civil penalties over a ten-year period – an estimate the CBO admits "is subject to significant uncertainty."[124] Nevertheless, the Act is likely to result in an increase in cases surviving dismissal for lack of materiality.

[123] *Senators Introduce Bipartisan Legislation To Fight Government Waste, Fraud*, Chuck Grassley (July 26, 2021), https://www.grassley.senate.gov/news/news-releases/senators-introduce-of-bipartisan-legislation-to-fight-government-waste-fraud.
[124] *Cost Estimate*, Congressional Budget Office (July 15, 2022), https://www.cbo.gov/system/files/2022-07/s2428.pdf.

Companies will need to consider the Act's effect on their relationships with *former* employees. Because former employees would be able to bring FCA retaliation claims, companies must be careful not to take any actions (such as giving negative employment references) that could lead to retaliation claims by individuals who are no longer at the company.

While it is unclear when, or even if, the bill will be up for a vote, the bill's co-sponsors have expressed the importance and urgency of the bill's passing. Senator Grassley, who was one of the sponsors of the landmark 1986 amendments to the FCA, has stressed that in light of Congress's appropriation of trillions of dollars for COVID relief, the proposed FCA amendments "are needed, more than ever, to fight the significant amounts of fraud that we are already seeing[.]"[125]

State legislative developments

This year, a number of states have enacted new state false claims acts or attempted to amend existing ones:

Colorado. On June 7, Colorado signed the Colorado False Claims Act (CFCA) into law. While most state false claims acts mirror the federal FCA, the CFCA deviates from the FCA in ways that may affect defendants. For example, the CFCA requires courts to impose double damages, as opposed to the default treble damages, for liable defendants who voluntarily self-disclose information within 30 days of discovering it, are subject to an FCA investigation that is under seal, and do not know about the investigation. The CFCA also requires courts to impose 1.5 times damages if defendants voluntarily self-disclose information before an FCA action is filed. These provisions differ from those in the federal FCA, which give courts discretion to impose double damages to similarly situated defendants.

In effect, the CFCA rewards defendants who proactively detect and report issues, while also giving defendants the certainty that their self-disclosure and cooperation will be rewarded. The CFCA also requires the Colorado Attorney General to consider certain factors when deciding whether to grant a dismissal of the action, including the severity of the false claim, the program or population affected by the false claim, and the duration of the fraud. Thus, companies should assess the effectiveness of their compliance programs in promptly detecting issues to stop problematic conduct and consider self-disclosure as soon as possible.

Connecticut. A bill introduced earlier this year in Connecticut would have expanded the scope of the Connecticut False Claims Act to beyond state-administered health or human services programs, which are the only types of claims currently allowed. The bill has not passed and appears to have died in the Senate.[126]

Wisconsin. In Wisconsin, a bill that would have expanded the state's false claims act to allow qui tam cases against those who make false claims for medical assistance is also no longer alive as it failed to pass the state senate.[127]

Michigan. A bill in Michigan which would similarly expand the scope of the state's false claims act beyond the state's Medicaid program is currently before the Michigan House.[128]

New York. A New York bill, which passed in the state legislature and is currently awaiting approval by the governor, expands the New York False Claims Act to include actions against individuals and companies who knowingly fail to file their tax returns.[129]

Considering the ever-changing landscape of state false claims legislation, companies should keep abreast of any updates and consult local counsel as necessary to assess, enforce, and amend its compliance strategy accordingly.

[125] *Senators Introduce Bipartisan Legislation To Fight Government Waste, Fraud*, Chuck Grassley (July 26, 2021), https://www.grassley.senate.gov/news/news-releases/senators-introduce-of-bipartisan-legislation-to-fight-government-waste-fraud.

[126] *See* Mitchell Newmark, *Tax Justice Prevails as Connecticut Sinks FCA Expansion*, JD Supra (May 19, 2022), https://www.jdsupra.com/legalnews/tax-justice-prevails-as-connecticut-1075243/.

[127] Wisconsin State Legislature, *Senate Bill 652*, https://docs.legis.wisconsin.gov/2021/proposals/reg/sen/bill/sb652.

[128] Michigan Legislature, *House Bill 6032 (2022)*, https://www.legislature.mi.gov/ (S(0qvyvfentogvo0ziwqi5lm0v))/mileg.aspx?page=BillStatus&objectname=2022-HB-6032.

[129] The New York State Senate, *Senate Bill S8815*, https://www.nysenate.gov/legislation/bills/2021/s8815.

About us

We believe great businesses can help make a better world. Forward-thinking, innovative organizations can find the answers to today's most difficult questions. That's why, every day, we help them succeed.

Our bold and dynamic culture means we think big and act decisively. Because relationships are at the heart of everything we do for our clients and communities.

Find out more on dlapiper.com.

For more information

Learn more about our practice by contacting these members of our False Claims Act Strike Force, or reach us via FCAStrikeForce@dlapiper.com.

Christopher George Oprison
Partner
chris.oprison@dlapiper.com

Courtney Gilligan Saleski
Partner
courtney.saleski@dlapiper.com

Joe Roselius
Partner
joseph.roselius@dlapiper.com

Ben Fabens-Lassen
Associate
ben.fabens-lassen@dlapiper.com

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